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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GARY LEE BUSH, Defendant and Appellant.	E053782 (Super.Ct.No. FVI1100150) OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam I. Morton, Judge. Judgment affirmed. People's motion to dismiss appeal denied.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

Before a preliminary hearing could take place, defendant pled nolo contendere to committing a lewd and lascivious act on a minor (Pen. Code, § 288, subd. (a)).[1] He was sentenced to the agreed-to term of eight years in prison. As part of his plea bargain, he waived his right to appeal. His Request for a Certificate of Probable Cause was denied by the trial court. Defendant appeals, claiming the trial court should have viewed a copy of an Application to Withdraw Plea Pursuant to section 1018 which he had written for and submitted to his attorney, but which the attorney did not file with the court, as a Petition for a Writ of Error *Coram Nobis*, which the trial court should have granted. Alternatively, defendant asserts that the trial court should have viewed his Request for a Certificate of Probable Cause as a Petition for a Writ of Error *Coram Nobis*, which the trial court should have granted. We reject both of his contentions and affirm the judgment.[2]

The People filed a Motion to Dismiss defendant's appeal on the bases that he waived his right to appeal as part of his plea bargain and he failed to obtain a certificate of probable cause. While there is undeniable merit in the People's position, and we address defendant's waiver of his right to appeal and his failure to obtain a certificate of probable cause below, for the sake of conveying to defendant clearly why this court has taken the position it has on the merits of his claims, we will bypass both of those realities

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant also filed a Petition for Writ of Habeas Corpus (case no. E054952) on the grounds of incompetency of counsel which we considered with this appeal for purposes of determining whether an order to show cause should issue. We will resolve that petition by separate order.

and deal with the merits of his claims. Therefore, we will deny the People's motion for that reason only and not because it is unmeritorious.

The facts involving this crime need not be stated as they are not relevant to the appeal, except to the extent that they are briefly discussed below. Otherwise, for the protection of the privacy of the victim, we will not divulge them here.

PROCEEDINGS BELOW

On January 20, 2011, defendant was charged by complaint with one count of committing lewd and lascivious acts on a minor during a four and one-half year period (§ 288, subd. (a)). On March 22, 2011, the court's minute order stated, "Defense oral motion for continuance is granted . . . to consider People's offer even though People may perhaps file an amended complaint alleging additional charges at which time offer may change[.]"

On April 4, 2011, defendant signed a change of plea form in which it was stated that the sentence range for the charged offense was thee, six or eight. Also in the change of plea form, defendant stated that he was pleading nolo contendere to the charge because the district attorney had agreed to a sentence of eight years in prison. He stated that no one had promised or suggested to him that he "will receive . . . anything else to get [him] to plead nolo contendere . . . ." He said that no one had used duress or undue influence of any kind on him to get him to plead nolo contendere. He also stated, "I have had sufficient time to consult with my attorney concerning my intent to plead guilty/no contest to the above charge(s) (and admit any prior conviction or enhancement). My lawyer has explained everything on this declaration to me, and I have had sufficient time

to consider the meaning of each statement. I have personally placed my initials on certain boxes on this declaration to signify that I fully understand and adopt as my own each of the statements which correspond to those boxes." Defendant waived his right to appeal from the conviction and judgment or any motion he may have brought or could bring. His retained attorney signed the following statement, "I . . . state that I . . . personally read and explained the contents of the above declaration to the defendant; that I personally observed the defendant sign said declaration; that I concur in the defendant's withdrawal of his . . . plea[] of not guilty; and that I concur in the defendant's plea[] of . . . nolo contendere (no contest) . . . as set forth by the defendant in the above declaration."

At the taking of the plea, defendant acknowledged that he had initialed and signed the change of plea form, only after reviewing it with his attorney, making sure he understood everything. The trial court said to defendant, "[I]t's my understanding you're pleading guilty to . . . [a] violation of Penal Code 288(a) which carries a maximum eight years state prison, and you're going to do eight years state prison. [¶] Is that your full understanding?" Defendant said it was. He acknowledged that no one had made a promise of anything to get him to enter his plea. Defendant said he had had enough time to discuss his case with his attorney, including penalties and punishments, and he understood them. His attorney agreed that he had had adequate time to discuss all issues of the case with defendant, that he had gone over the change of plea form and declaration with defendant and he was satisfied that defendant understood everything on the form and everything he needed to know about his case. The trial court found that defendant

had read and understood the change of plea form and declaration and the nature, consequences and punishments for the charge against him. Sentencing was set for May 13, 2011.

On May 13, 2011, defense counsel asked the court to modify the sentence to the midterm of six years.[3] The People opposed this, pointing out that defendant had agreed to eight years. Pursuant to the plea bargain, the trial court sentenced defendant to eight years.

According to his probation report, defendant has an Associate of Arts degree in criminal justice, had been honorably discharged from the National Guard and the Army Reserve and had been working as a United States Customs and Border Protection Agent at Los Angeles International Airport for three years at the time he was arrested. According to the statement of the victim in the probation report, defendant perpetrated many sex offenses on the victim, who lived with him, over a period of several years. The probation officer concluded that defendant had "repeatedly victimized" her.

On May 18, 2011, defendant signed a Notice of Appeal in the trial court, which was filed on May 31, 2011.[4] Although on the first page of the Notice of Appeal, defendant checked the box that stated, "This appeal is based on the sentence or other

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[3] In response to this, the trial court said to defense counsel, "This is a plea agreement for eight years." Defense counsel replied, "I understand that."

[4] In the Clerks Transcript, the Notice is preceded by a copy of an envelope, which we assume was the means by which the Notice was sent. The envelope is post marked May 27, 2011.

matters that occurred after the plea and do not affect its validity" on the next page, under "Possible issues on appeal" defendant wrote, "I signed the a [*sic*] deal equal to the max[imum] sentence if I would've lost at trial in which you were never made aware of that fact [*sic*]." In his Request for a Certificate of Probable Cause" defendant wrote, "I informed my attorney that I wanted to withdraw my plea before my sentencing. . . . [M]y charges [*sic*] carried [a term of] 3, 6, & 8 [years] not 15 to life. I was told if I went to trial and lost[,] I would get 15 to life. . . . I feel that my attorney did not help me and did not do what I asked him to do and pull my plea." Although defendant stated that he mentioned this in the probation report, there is no such reference.[5]

He enclosed with his Notice of Appeal and Request for a Certificate of Probable Cause a copy of what he entitled an "Application to Withdraw Plea Pursuant to P.C. § 1018" which, he stated in his Request for a Certificate of Probable Cause, was what he had tried to give his attorney "to pull my plea but [h]e didn't." The Application is not signed, it is not file stamped by the trial court clerk's office and a good deal of it cannot be read, based on the copy supplied to this court.[6] In the parts that can be read, defendant asserts that after taking the plea deal, he did not have a chance to discuss (he doesn't say with whom) his desire to withdraw his plea. Defendant asserted that he had a right to

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[5] What defendant did state was that he was innocent and the victim, his daughter, and his current wife (not the victim's mother) set him up. He also said that he feared going to prison because he believed there was a "hit" out for him and people were trying to be sentenced to the same prison as he would be in so they could kill him.

[6] The copy in this court's own file is slightly more legible than the copy in the Clerk's Transcript.

effective assistance of counsel and, as part of that argument, he states that before he signed the plea deal, his attorney advised him that he was facing 15 years to life if he did not take the deal. Defendant went on to assert that the only reason he took the plea deal was because of "false advice" concerning his maximum exposure by his attorney. He cited a case he asserted held that defense counsel must accurately advise a defendant of the sentence offered by the prosecutor and of possible exposure should the case go to trial. Defendant also cited a case he asserted held that if a defendant wants to withdraw his plea based on ineffective assistance of counsel, the trial court should appoint new counsel to represent defendant in a motion to withdraw.

Also in the envelope mailed to the trial court clerk's office[7] is a letter to the appeals division of the trial court dated May 26, 2011. In that letter, defendant asserted that he had been told by his attorney that he would get "8 years at (50%) half time." He added that his attorney told him that he was facing 15 years to life if he was convicted at trial. He said that his family made him aware that the maximum term he was facing "for his charges" was eight years, but he had already signed the plea agreement and his attorney was not truthful to him about this. He said his plea deal was signed "in blind faith" because his attorney advised him of a maximum sentence that was not "true." He asked that the court rescind or modify his sentence, as he had unsuccessfully asked his attorney to withdraw his plea before sentencing because he had found out that he had been misled about the maximum term at the time he agreed to the plea. He claimed he

[7] Defendant addressed it to the appeals division.

had asked his attorney "on several occasions" before sentencing to show the prosecutor and the court citations to cases in which other defendants received the mid or low term for the same offense, but the attorney did not.[8] He repeated his claim that fellow inmates were going to try to kill him and that his job as a United States Border and Customs Official somehow had something to do with the fact that he received the upper term.

The trial court denied defendant's request for a Certificate of Probable Cause.

1. *The Trial Court Should Have Viewed Defendant's "Application to Withdraw Plea Pursuant to Penal Code Section 1018" as a Petition for Writ of Error Coram Nobis and Conducted a Hearing on It*[9]

Acknowledging, as he must, that his application to withdraw his plea under section 1018 was time-barred when it arrived at the trial court clerk's office, defendant asserts that the trial court erred in not considering the application as a petition for writ of error *coram nobis* and holding a hearing on it. First, the application was not signed and was not even filed as an independent document. Rather, it was attached to defendant's Request for a Certificate of Probable Cause because defendant was attempting to show the trial court what he claimed he had given his attorney to file on his behalf. Thus, the record suggests that defendant did not even intend that the trial court act on the

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[8] However, in none of the three cases defendant listed in the papers mailed to the trial court clerk's office did the defendants suffer a current conviction for one count of violating section 288, subdivision (a).

[9] For purposes of this discussion only, we will disregard the fact that defendant failed to obtain a certificate of probable cause from the trial court. Although the People view defendant's arguments as including an attack on the trial court's denial of his Request for a Certificate of Probable Cause, we cannot find such an argument in defendant's opening brief.

document. Second, in the portion of the Application that can be read, as stated above, defendant asserted that he took the plea deal due to "false advice" by his attorney as to the maximum sentence he was facing and that he should be allowed to withdraw his plea based on incompetency of counsel. Nowhere does he allege that he was psychologically coerced into pleading guilty—rather, he asserts that he pled guilty because of misinformation his attorney gave him.

No doubt realizing that a writ of error *coram nobis* does not lie for the claim of misadvise by counsel defendant makes in his application (*People v. Kim* (2009) 45 Cal.4th 1078, 1093, 1095, 1096 (*Kim*) [*Coram nobis* writ is not available to the defendant who, 1) pleads because of ignorance or mistake as to legal effect of facts or, 2) claims he was incompetently represented or, 3) claims his attorney did not advise him before he pled of the consequences of his plea]; *People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352 (*McElwee*) [the defendant's belief when he pled guilty that he would serve only 15 years of a 15 years to life sentence is an error of law, not of fact, which is not able to be remedied by a writ of error *coram nobis*])[10] defendant here seeks to recast his claim as one of "psychological coercion" by his attorney in inducing him to enter his plea.[11] But,

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[10] In *McElwee*, which was cited in *Kim*, the appellate court held that writs of error *coram nobis* give relief for errors of fact and the defendant's belief when he pled guilty that he would serve only 15 years of a 15 years to life term was not an error of fact, but one of law.

[11] Defendant's one and only authority for converting his claim of incompetency/misadvise by counsel into a claim of psychological coercion to enter his plea is *People v. Lampkin* (1968) 259 Cal.App.2d 673. Ironically, therein, the defendant actually claimed that his plea was the result of "'duress and psychological and mental

[footnote continued on next page]

if it walks like a duck, and quacks like a duck, it's still a duck and this is still a claim of incompetency/misadvise by counsel. It was defendant, himself, who cast his Application in terms of incompetency of counsel rather than psychological coercion.

Even if defendant may be permitted to recast his claim to take it out of the realm of the holding in *Kim*, and the cases it cites, he still does not qualify for a writ of error *coram nobis* because other remedies were available to him, such as appeal and a writ of habeas corpus (*Kim, supra*, 45 Cal.4th at pp. 1078, 1093), both of which he is pursuing in this court. However, we cannot allow this defendant to circumvent the requirement of obtaining a Certificate of Probable Cause as a prerequisite to pressing his appeal (which applies to *all* pleading defendants) and to ignore the fact that he signed away his right to appeal as part of his plea bargain by claiming that what he actually did here was request a writ of error *coram nobis* for something that is not based on mis-advise or incompetency of counsel.

Finally, as is clear in *Kim*, defendant would not be entitled to a writ on the merits, even if the trial court believed his assertions. In *Kim*, the defendant contended in his petition for a writ that he was unaware that by pleading, he subjected himself to deportation and his attorney was incompetent for not knowing this and for failing to

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[footnote continued from previous page]
coercion'" in part because the prosecutor had promised him a more lenient sentence than he received. (*Id*. at p. 677.) Still, the appellate court upheld the trial court's *refusal to grant defendant a hearing* because his claim constituted "a conclusion unsupported by any factual statement which would satisfy the requirements" of a writ of error *coram nobis*. (*Id*. at p. 678.) Additionally, the appellate court noted that the defendant's claims flew in the face of contrary representations he made to the trial court at the time he entered his plea. (*Id*. at pp. 679-680.)

negotiate a plea to a non-deportable offense. (*Id*. at p. 1102.) The California Supreme Court concluded, "None of these alleged new facts supports issuance of a writ of error *coram nobis*. To qualify for issuance of the writ, the alleged facts must be such that "'if presented would have prevented the rendition of the judgment.'" [Citation.] . . . Defendant's alleged new facts . . . speak merely to the *legal effect* of his guilty plea and thus are not grounds for relief . . . . [Citations.] [¶] Defendant's allegations that he would not have pleaded guilty had he been armed with these additional facts, or that counsel would have been successful in arranging a plea to a non-deportable offense had these facts been known, fundamentally misapprehends the pertinent inquiry. To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. [Citations.] . . . *New facts that would have affected the willingness of a litigant to enter a plea . . . are not facts that would have prevented rendition of the judgment* [¶] . . . [¶] [Neither allegation that] defendant's . . . counsel was constitutionally ineffective for failing to investigate and for failing to negotiate a different plea . . . states a case for relief on *coram nobis*. . . . [A] claim of ineffective assistance of counsel . . . relates more to a mistake of law than of fact . . . . [Citations.] Although an attorney has a constitutional duty at least not to *misadvise his or her client* as to the . . . consequences of the plea [citations], any violation in this regard *should be raised in a motion for a new trial or in a petition for writ of habeas corpus*. [Citation.]" (*Id*. at pp. 1102-1104, italics added and omitted.)

2. *The Trial Court Should Have Viewed Defendant's Request for a Certificate of Probable Cause as a Petition for Writ of Error Coram Nobis and Conducted a Hearing on It*

Defendant's assertion in his Request for a Certificate of Probable Cause varied from the assertions in his Application to Withdraw Plea Pursuant to Penal Code section 1018. In his request, defendant did not explicitly state that it was his attorney who advised him that he was facing 15 years to life if he went to trial. However, we will assume that that is what he meant and pause to observe that, under the circumstances, defense counsel may well have told defendant that if he did not take the deal being offered by the prosecutor and he went to trial, he might end up with 15 years to life. This is so because the record before us suggests that defendant committed more than the one act against the victim, and those additional acts were more substantial in nature than a violation of section 288, subdivision (a), the People were contemplating bringing more charges against defendant and if they had, and defendant had been convicted of a violation of section 288.7, subdivision (b), he could have been sentenced to prison for 15 years to life. Under these circumstances, the advice defendant alleges he received from his attorney would not have been incorrect. To the extent defendant wishes us to ignore the specifics of what he said in his request and act as though he was essentially mirroring what he alleged in his request, we incorporate section 1 of this opinion here by reference.

DISPOSITION

The judgment is affirmed. The People's motion to dismiss the appeal is denied.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.